

## STATEMENT OF CONSIDERATION RELATING TO:

401 KAR 5:074 - Not Amended After Hearing

Natural Resources and Environmental Protection Cabinet  
Department for Environmental Protection  
Division of Water

I. A public hearing on proposed administrative regulation 401 KAR 5:074 was held May 22, 2001, at 6:30 p.m. Central Time at the Madisonville Technical College in Madisonville, Kentucky.

II. The following individuals attended the public hearing or submitted oral or written comments:

### Name and Title

Neil Allen, Chair

Charles Bates

Jimmy Blakeley

Norma Caine

Pete Cashel, President

Aloma Dew

Lee Dew

Margie Durham

Bernardine Edwards

Edward Fox

Rebeckah T. Freeman

Sam Gilkey, Reporter

Hank Graddy, Attorney

Patricia Hawkins

Wade Hampton Helm

Lynde Hughes

David Jurgons

Rita Kelley

Carole Knoblett

Ronnie Larkins, President

Ira Linville

Dennis Liptrap

Heather Roe Mahoney

### Affiliation

KY Farm Bureau's Natural Resources  
Advisory Committee

Concerned Citizen

Farmer

Concerned Citizen

Community Farm Alliance

Sierra Club

Sierra Club

Concerned Citizen

McLean Co. Citizens Against  
Factory Farms

Farmer

KY Farm Bureau Federation

The Messenger

Cumberland Chapter, Sierra Club

Hopkins Co. Magistrate

KY Conservation Committee

Perdue Farms

Perdue Farms

Tyson Producer

Kentucky Poultry Federation

Kentucky Poultry Growers Co-op

KY Department of Agriculture

Pig Farmer

Democracy Resource Center

John Miller  
 Terri Miller  
 Harold Murphy  
 Al O'Reilly  
 David Phillips  
 John Porter  
 Thomas Porter  
 Elbert Power  
 Jeff Power  
 Sue Anne Salmon  
 Emmitt Stanley  
 Anita Stanley  
 Barbara Thomas

Scott Vander Ploeg, Chair

Judith A. Villines (for Tyson and Perdue)  
 Karol Welch, Magistrate  
 Coletta Wheller, Magistrate  
 Debby Whitt  
 Ann Wilkerson  
 Todd Wright

Farmer  
 Tyson Producer  
 Farmer  
 Farmer  
 Tyson Foods, Inc.  
 Kentuckians for the Commonwealth  
 Farmer  
 Concerned Citizen  
 Tyson Foods, Inc.  
 Concerned Citizen  
 Concerned Citizen  
 Concerned Citizen  
 McLean Co. Citizens Against  
 Factory Farms  
 Tradewater/Bowling Green  
 Watershed Watch Project  
 Stites & Harbison Attorneys  
 Hopkins County Fiscal Court  
 Hopkins County Fiscal Court  
 Concerned Citizen  
 Kentuckians for the Commonwealth  
 Tyson Foods

The following people from the promulgating administrative body attended this public hearing:

Name/Title

\*Jack A. Wilson, Director  
 Robert W. Ware, Asst. Director  
 Bruce Scott, KPDES Branch Manager  
 Julie B. Duncan  
 Larry Dusak, Regulation Coordinator  
 Ron Price  
 Ed Carroll  
 Allen Kidd  
 Mark York  
 Brenda Jones  
 \*Agency Representative

Agency

Division of Water  
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 NREPC, Secretary's Office  
 Court Reporter

### III. Summary of Written and Oral Comments Received, and the Division of Water Responses

#### **(1) Subject: Support for Regulations and Enforcement**

(a) Comment: Aloma Dew, Sierra Club

Once again, the Sierra Club wants to go on record in support of the proposed regulation. Are they as strict as we want? No. Do they provide adequate protection for neighbors and the environment? We don't think so. But it is a start and shows that Kentucky is serious about protecting the resources of our state – physical and human. What we do want is for the regulations to be enforced. We see little evidence that this has been happening even though the regulations, in one form or another, have been in effect for some time. We need greater resolve to enforce laws already on the books, as well as the CAFO regulations.

(b) Response: The cabinet enforces regulations in an appropriate fashion within existing resource constraints.

#### **(2) Subject: Integrator Liability - Support**

(a) Comment: Aloma Dew, Sierra Club

The most important part of these regulations remains to be Integrator liability. It is the piece that seems most opposed by the corporations. We maintain that whoever owns the chickens, controls their feed and care, and makes the largest profit must be held partly responsible for any resulting environmental or health problems. We do not understand why the corporations who assure us that they do everything correctly, would not agree that this is fair. It surely can not be fair to leave the grower deeply in debt and holding the bag, while the corporations rake in huge profits. We certainly think it is a fair protection for the growers who are really managers for someone else's animals. We must have these regulations, especially integrator liability to protect our water, our health, our small farmers – for our families, for our future. We need them now, not next year or two years from now, but now.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

#### **(3) Subject: Individual Permits**

(a) Comment: Aloma Dew, Sierra Club

We again say the individual KPDES permits are necessary – not broad general permits. Local residents have the right to be informed of large operations and to respond. Because Kentucky is such a delicate geologic and hydrologic system, no one knows better than local residents do what is unique and worthy of note in their communities. Each part of Kentucky is different, but much of the state is karst topography where surface water and groundwater are often the same – we must protect this delicate, irreplaceable resource. We cannot live without clean water, \$1,000 for a permit is a lot of money, but nothing compared to what it would cost to cleanup (if that is even possible) after waste contaminants surface or groundwater. If the corporation is co-permittee, it makes sense that they would help with this payment.

(b) Response: The proposed administrative regulation does not address the matter of individual or general KPDES permits. With respect to the processing of KPDES permits, the Cabinet is utilizing a combination of general and individual permits to permit CAFOs in

Kentucky. Each operation is evaluated individually to determine whether a general or individual KPDES permit is warranted.

**(4) Subject: Unlawful Regulation**

(a) Comment: Ira Linville, KY Department of Agriculture

The Cabinet now issues KPDES permits for point source discharges. Definitions for point sources and concentrated animal feeding operations are included in 401 KAR 5:002. The definition also includes the exemption of agricultural stormwater runoff from point source discharge permit requirements. At present, federal regulations do not deem land application areas to be point sources thus any runoff could be considered a nonpoint source and not subject to KPDES permit requirements.

(b) Response: Cultivated crop areas that are associated with Concentrated Animal Feeding Operations are considered point sources pursuant to 33 USC Section 1362. CAFOs are clearly defined in federal law as KPDES “point sources.” 33 U.S.C. Section 1362 defines “point source” as follows:

The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharge and returns flows for irrigated agriculture.

33 U.S.C. Section 1362(14).

CAFO meets the definition of point source. Congress did not define “concentrated animal feeding operations”, but EPA has done so in the Code of Federal Regulations. Any operation that meets that definition is a “point source”. It thus becomes a facility or activity regulated by the CWA.

**(5) Subject: Individual Permits**

(a) Comment: Ira Linville – KY Department of Agriculture

The Code of Federal Regulations, 40 CFR 122.23 and Appendix B, define concentrated animal feeding operations. Those confined operations that meet the threshold numbers or other conditions in that excerpt are subject to the NPDES/KPDES Permit Program. The Cabinet is using this information or criteria with two exceptions. Federal law does not specify whether the permit should be a general permit or individual permit.

(b) Response: The proposed administrative regulation does not address the matter of individual or general KPDES permits. With respect to the processing of KPDES permits, the Cabinet is utilizing a combination of general and individual permits to permit CAFOs in Kentucky. Each operation is evaluated individually to determine whether a general or individual KPDES permit is warranted.

**(6) Subject: Stringency**

(a) Comment: Ira Linville – KY Department of Agriculture

The Cabinet is using the poultry number of 100,000 chickens without further qualifications. Federal regulation specifies 100,000 laying hens or broilers with continuous overflow watering systems or 30,000 laying hens or broilers with a liquid waste management system for poultry to be included in a permit. There are no provisions for operations with a dry waste management system. 401 KAR 5:002 applies the same definitions found in federal regulations. Again, 401 KAR 5:074 is more stringent than federal regulations.

(b) Response: The proposed administrative regulation does not address this issue. Each poultry operation is evaluated on a case-by-case basis during the permitting process administered under the existing KPDES regulations.

In addition, the USDA/USEPA's "Draft Guidance Manual and Examples of NPDES Permits for Concentrated Animal Feeding Operations," August 6, 1999, Section 2.3.2 notes that poultry operations that remove dry litter waste from pens and stack it in areas exposed to rainfall may be considered to have established a crude liquid manure system. This reflects EPA's interpretation of its program and indicates how EPA would issue federal NPDES permits.

**(7) Subject: CAFO Determination**

(a) Comment: Ira Linville – KY Department of Agriculture  
The regulation addresses beef, dairy, swine and poultry. However, any operation, regardless of size, that is discharging to waters of the United States may be considered a CAFO on a case-by-case determination by the Secretary and would be subject to the current permit program. This has been proven by enforcement actions under the Clean Water Act in other parts of the country. That provision is in current federal regulations.

(b) Response: This administrative regulation does not address the case-by-case determination that a facility is a CAFO.

**(8) Subject: Stringency**

(a) Comment: Ira Linville – KY Department of Agriculture  
Setbacks are included in the proposed regulation. The NPDES/KPDES program is based on water quality issues. Odor is an air quality issue and is not regulated by the Clean Water Act. Therefore, NPDES/KPDES does not apply to odor. Again, 401 KAR 5:074 is more stringent than federal law or regulation thus the regulation is in violation of KRS 13A.120. In our determination, the federal water quality laws and regulations do not provide for odor control from those facilities. Therefore, any setback provision based on odors rather than water quality protection does not have sufficient NPDES authority to regulate them or specify setback distances from facilities or land application areas.

(b) Response: This proposed administrative regulation is not issued only pursuant to the federal Clean Water Act. The proposed administrative regulation is also issued pursuant to the Cabinet's authority under KRS 224.20-110, which gives the Cabinet authority to regulate air pollution, and pursuant to KRS 224.10-100(5), which gives the Cabinet authority to provide for the prevention of odor problems.

**(9) Subject: No Need for Regulations**

(a) Comment: Ira Linville – KY Department of Agriculture

The Department (of Agriculture) does receive complaints about odor problems and makes a concerted effort to identify and correct those problems as part of a good neighbor policy for agriculture. Appropriate referrals are made to the Cabinet and to agriculture industry officials who can address those odor problems. At times, our follow up is directly with the producer to solve the problem. In other situations, both the producer and the company are involved in solving the problem. Often, unrelated issues are manifested via odor complaints. For those issues, there is no regulatory solution.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(10) Subject: No Need for Regulations**

(a) Comment: Ira Linville – KY Department of Agriculture

There have been complaints about improper dead animal disposal. The Department (of Agriculture) has responsibility for dead animal disposal and those complaints are addressed under current authority in KRS 257.160 Disposal of Animal Carcasses. The Department responds to referrals by other agencies for this type of complaint.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(11) Subject: No Need for Regulations**

(a) Comment: Ira Linville – KY Department of Agriculture

Two permits addressed in 401 KAR 5:005 are the Kentucky No Discharge Operating Permit (KNDOP) and the Kentucky Pollution Discharge Elimination System Permit. The KNDOP meets the federal effluent limitation guideline requirements of 40 CFR Part 412-Feedlots Point Source Category. Those guidelines specify no discharge from CAFOs except chronic or catastrophic rainfall events. The same guidelines require using the “best practicable control technology currently available” and the “best available technology economically achievable.” Those same requirements apply to KPDES permits. The federal effluent guidelines have been used in the past to successfully defend the KNDOP to the US EPA.

Therefore, current authority exists for the Cabinet to issue permits making the permanent regulation unnecessary. Any changes in regulations should follow due process for promulgating permanent regulations. According to KRS 13A.120, those changes should not be more stringent than federal law or regulation.

(b) Response: The KNDOP program does not contain all of the administrative requirements of the KPDES program which is necessary to be functionally equivalent. The Cabinet has therefore chosen to regulate CAFOs under the federal KPDES program and other animal feeding operations under the state KNDOP program. The proposed administrative regulation is necessary to set forth a “bright line test” for integrator liability and to standardize Best Management Practices by creating specific setbacks for the permits. They are in accordance with the federal Clean Water Act requirements.

**(12) Subject: No Need for Regulations**

(a) Comment: Ira Linville – KY Department of Agriculture

The EPA has made an uncontested attempt to re-interpret federal law and regulations without due process for rulemaking. Based on EPA's premise, states are being encouraged to make changes in a similar fashion. No state should make changes until the federal law or regulation has been revised or promulgated. The EPA is currently revising effluent limitation guidelines and CAFO regulations that are now open for public comment.

(b) Response: Because of the current emergency situation, Kentucky cannot wait for EPA to act. This proposed administrative regulation is in accord with federal Clean Water Act requirements and it is based on additional state statutory authority.

**(13) Subject: No Need for Regulations**

(a) Comment: Ira Linville – KY Department of Agriculture  
EPA is encouraging the state to address is co-permitting or integrator liability. This, too, is a concern that should be resolved at the national level. Federal law or regulation does not address this issue. However, EPA is attempting to re-interpret the Clean Water Act to apply co-permitting requirements. This, too, may lead to resolution in judicial court. Until such time, the state should take no action. Action may place Kentucky producers at an unfair disadvantage competing with surrounding states.

(b) Response: Because of the current emergency situation, Kentucky cannot wait for EPA to act. This proposed administrative regulation is in accord with federal Clean Water Act requirements and it is based on additional state statutory authority.

**(14) Subject: No Need for Regulations**

(a) Comment: Ira Linville – KY Department of Agriculture  
Currently, there are best management practices (BMPs) for animal waste management and utilization, including nutrient management. The Agriculture Water Quality Authority, with assistance of the technical committees, can develop new or revised BMPs to address the environmental issues. The Cabinet can link permit conditions to the State Agriculture Water Quality Plan. By using the existing authorities, no additional authorities or regulations are needed at this time.

(b) Response: The BMPs required under the Agriculture Water Quality Plan will be given the opportunity to work. The BMP requirements in KPDES permits issued to CAFOs are equivalent to the Agriculture Water Quality Plan. However, the Agriculture Water Quality Act, KRS Subchapter 224.71 is a state statute pursuant to state only authority and not pursuant to the Clean Water Act. Independent of that statute, the Cabinet has responsibility pursuant to KRS 224.16-050(1) to administer the provisions of the Clean Water Act 33 U.S.C. 1251, et seq. The Agriculture Water Quality Act is not stringent enough to meet the requirements of the federal Clean Water Act. It does not, for example, govern the issuance of NPDES permits required by the Clean Water Act. Thus relying on it alone would violate the provisions of the Clean Water Act found in 33 U.S.C. 1370.

**(15) Subject: Need for Regulations - Support**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club

The Sierra Club and KY Conservation Committee support the Governor's and the Cabinet's determination of a need to promulgate both emergency and permanent regulations for beef, dairy, poultry and swine concentrated animal feeding operations (CAFOs). It is the Cabinet's duty to protect human health and the environment.

(b) Response: The Cabinet acknowledges the support.

**(16) Subject: Regulation is Inadequate**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club

Recently USDA NRCS published revised conservation practices to address the growing concern about phosphorus. 66 Federal Register. Number 3, January 4, 2001. That guide appears to authorize manure application up to a limit of 20 tons/acre/year. However the EPA proposed rule published on January 12, 2001 states that the phosphorus content of litter from boilers means that 2.23 tons of chicken litter per acre per year will supply all the phosphorus needed for a typical acre of crops.

At the Kentucky Water Resources Symposium earlier this year, research done at UK appears to document that the application of chicken litter at the rate of 1 ton/per acre would cause an increase of fecal coliform in one hour 28 inches below the surface. Where there is such wide variation about the water quality consequences from application of chicken litter, the Cabinet must include the land application of litter within the KPDES permitting requirements and must set Best Management Practices (BMPs) that are protective of the environment.

(b) Response: The Cabinet agrees the land application of poultry litter must be done in a manner that will be protective of human health and the environment. The proposed regulation establishes setbacks to deal with some of the issues presented by the land application of poultry litter. Beyond this, the Cabinet requires KPDES permits for operations defined as CAFOs which includes the use of Best Management Practices (BMPs). This includes the development of nutrient management plans for the land application of poultry litter.

**(17) Subject: Regulation is Adequate**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club

We have previously attached articles relating to the health hazards to which poultry workers are exposed, including ammonia, endotoxins and histoplasmosis. The authors of those articles concluded that, even when the houses were well ventilated, the air quality inside chicken houses creates a risk of respiratory problems for poultry workers so great that they should all wear breathing masks. If this is the risk to people who go into poultry houses from time to time, what about the risk to people who live next to those houses and who have fans aimed at their front porch and must breath what is being well ventilated out of the houses onto their property? Emissions of ammonia, methane and hydrogen sulfide from CAFO's must be controlled.

(b) Response: The Cabinet has proposed to address concerns related to the emission of air pollutants via the use of setbacks. The proposed setbacks are the result of evolving process that the Cabinet has undergone since early 1997. They represent the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(18) Subject: Statutory Authority – Supports**



(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club

The Cabinet refers to KRS 224.10-100 as providing authority for the regulation. Sierra Club calls attention to Section (5) of that statute, which states that “the cabinet shall have the authority, power and duty to: Provide for the prevention, abatement and control of all water, land and air pollution including, but not limited to, that related to particulates, pesticides, gases, dust, vapors, noise, radiation, odor, nutrients, heated liquid, or other contaminants;”

In addition, to the above authority, the General Assembly has provided the Cabinet with additional statutory authority and duty to require all entities that contribute to water or air pollution take responsibility for preventing these pollution problems. KRS 224.70-110 imposes a duty on both those who directly and those who indirectly discharge into the waters of the Commonwealth, generally prohibiting such discharges in contravention of the rules, regulations, permits and orders of the Cabinet. This statute was enacted in 1950, 22 years before the Clean Water Act. KRS 224.20-110 provides a similar general prohibition against air pollution, imposing duties both on those who pollute the air directly and those who pollute indirectly.

(b) Response: This proposed administrative regulation relates to KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110, 224.20-120, 224.70-100, 224.70-110, and 33 U.S.C. § 1342 and the statutory authority for the proposed administrative regulation is KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110 and 33 U.S.C. § 1342. The proposed administrative regulation is based on more than the federal Clean Water Act. This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.

This proposed administrative regulation is not issued only pursuant to the federal Clean Water Act. The proposed administrative regulation is also issued pursuant to the Cabinet’s authority under KRS 224.20-110, which gives the Cabinet authority to regulate air pollution, and pursuant to KRS 224.10-100(5), which gives the Cabinet authority to provide for the prevention of odor problems.

#### **(19) Subject: Integrator Liability - Support**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club

The Clean Water Act also makes it clear that those entities with substantial control over a facility that may cause water pollution must comply with the Act. CWA §306(a)(4) defines the term “owner or operator” to mean. “any person who owns, leases, operates, controls, or supervises a source.” Sources includes feedlots. CWA §306(b). The federal regulations provide further detail on who must act to comply with CWA requirements. 40 CFR §122.22 requires the following:

Signatories to permit applications and reports (applicable to State programs, see §123.25). (a) Applications. All permit applications shall be signed as follows:

“For a corporation:” by a responsible corporate officer. For the purpose of this section, a reasonable corporate officer means: (1) A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy-or decision-making functions for the corporation ...”

The federal regulations provide that a manager of a production facility may sign the application for large corporations, and the person in charge of environmental matters may file the reports. Kentucky regulations contain the same requirement. 401 KAR 5:060, Section 9.

While there is little case law interpreting the meaning of “owner and operator” it is clear that the requirement goes beyond mere labels or job descriptions, and applies to burden the entity that is actually responsible for creating the waste stream. See United States v. Lambert, 915 F. Supp. 797 (S.D. W.V. 1996).

(b) Response: The Cabinet agrees the producer is not the only responsible party for the facility. The Cabinet has used its regulatory authority to set forth a “bright line test” to guide the parties as to when an integrator is deemed to have substantial operational control and is therefore considered an operator. EPA is in agreement with the Cabinet that existing federal regulations create liability on the part of the integrators who meet the test set forth in the proposed administrative regulation.

The EPA administrator issues information and guidelines to the states in administering their programs. While guidance documents are not “regulation” or “law”, they serve to show how EPA interprets its program and would issue a permit.

**(20) Subject: New Regulation Language**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club

The Sierra Club strongly supports the improved language in Section 2 clarifying that the Integrator, who owns the animals and who contracts with the landowner to raise the animals under the direction of the integrator, shall be defined as an “owner and operator” along with the landowner. We believe the language in 401 KAR 5:074 is more clear than the language in 401 KAR 5:072. The proposed language includes the terms, “exercises substantial operation control” over the CAFO. We were supportive of the prior regulation because that it was not clearly spelled out as it is in the proposed regulation, and we support including this language in the final regulation.

(b) Response: The Cabinet has used its regulatory authority to set forth a “bright line test” to guide the parties as to when an integrator is deemed to have substantial operational control and is therefore considered an operator. EPA is in agreement with the Cabinet that existing federal regulations create liability on the part of the integrators who meet the test set forth in the proposed administrative regulation.

The EPA administrator issues information and guidelines to the states in administering their programs. While guidance documents are not “regulation” or “law”, they serve to show how EPA interprets its program and would issue a permit.

**(21) Subject: Integrator Liability - Support**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club

Many growers’ contracts expressly identify the grower as an “independent contractor” in order for the integrator to avoid liability. However, the employment relationship created by those contracts is that of principal-agent. Recent case law supports this conclusion. See Tyson Foods, Inc. v. Stevens, 2000 WL 1716977 (Ala.)

(b) Response: This administrative regulation defines the parties responsible for the facility to the public. The contractual relationship between the grower and integrator is not the subject of this administrative regulation.

**(22) Subject: Support Regulation**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club  
Best Management Practices establish certain natural features and certain designated areas where CAFO facilities may not be constructed. Sierra Club supports these prohibitions.

(b) Response: The proposed setbacks are the result of evolving process that the Cabinet has undergone since early 1997. They represent the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(23) Subject: Stronger Setback Requirements**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club  
The Best Management Practices also contain setback requirements. These setback requirements are no more protective than the siting requirement contained in 401 KAR 5:072. Sierra Club has filed a complaint against the Cabinet that the Cabinet is required by KRS 224.10-110 and KRS 224.20-110 to establish best management practices and other regulatory requirements that are effective to protect people from air pollution, including odor. The proposed regulations are not protective enough and the final regulations must be more protective, based on the duty that the General Assembly has imposed on the Cabinet.

(b) Response: The proposed administrative regulation is the result of an evolving process that the Cabinet has undertaken since early 1997. The proposed administrative regulation represents the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(24) Subject: Poultry CAFO Exemptions**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club  
The Sierra Club strongly disagrees with the proposed regulation which effectively "grandfathers" in poultry houses, lagoons, litter storage structures and composting facilities if they existed on February 14, 2000. The Cabinet has had setback requirements for swine feeding facilities since 1998. The Kentucky Agriculture Water Quality Authority has had weak setback requirements since 1999. The regulations should require that all CAFO facilities shall meet reasonable setback requirements from other properties and from water resources, and that those facilities that are constructed in violation of reasonable setback requirements shall be phased out of operation based on consideration of severity of harm and risk.

(b) Response: The Cabinet recognizes that some existing physical structures related to CAFOs are non-compliant with the proposed setback requirements. However, the Cabinet has chosen not to require removal of those structures in this proposed regulation.

**(25) Subject: Land Application Restrictions**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club  
The Sierra Club strongly supports the requirement that all land application of waste at a CAFO shall comply with setback requirements.

(b) Response: The Division acknowledges the support.

**(26) Subject: Stronger Setback Requirements**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club

The Sierra Club urges the Cabinet to adopt setback requirements that will provide more effective protection to adjoining property owners than the distances set forth in the proposed regulation.

(b) Response: The proposed setbacks are the result of evolving process that the Cabinet has undergone since early 1997. They represent the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time. The poultry setbacks, for example, are based substantially on BMP #17 from the Agriculture Water Quality Plan. One notable exception is dwellings. Any future BMPs developed will be evaluated at that time.

**(27) Subject: Litter Storage Cost Share**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club

Sierra Club supports the requirement that Poultry CAFOs have permanent litter storage. However, we oppose the use of public funds for construction of litter storage facilities. The chicken litter is the responsibility of the integrator, and these companies have the financial resources to pay for the construction of these facilities.

(b) Response: The proposed regulation does not address the funding mechanism for permanent litter storage on poultry CAFOs.

**(28) Subject: Waste Transportation**

(a) Comment: W.H. Graddy, Cumberland Chapter, Sierra Club

The Sierra Club is concerned that the regulations do not address the responsibility of the CAFO owner and operator for waste that is transported off site. The proposed Federal regulations contain several suggestions about how to address this issue. Sierra Club supports CAFO owner/operator certification that the waste disposed of off-site has been properly handled.

(b) Response: The proposed regulation does not address off-site handling of manure generated by a CAFO. However, the KPDES permitting process does require that manure sent off-site from a CAFO be accounted for in the development of the Comprehensive Nutrient Management Plan (CNMP) or Agriculture Water Quality Plan (AWQP). The CNMP or AWQP is required pursuant to the Best Management Practices requirements of the NPDES regulations. With respect to "related" facilities, the KPDES regulations govern this requirement.

**(29) Subject: Need for Regulations - Support**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

Neighbors and those living downwind must be protected from the health effects, and devaluation of property caused by odors. The health effects of the odors and gases emanating from these facilities is one of the key concerns expressed by citizens who live near these facilities or are facing the possibility of large swine feeding operations in their area. The empirical evidence that these facilities can cause obnoxious odors to those living up to one or two miles distant is persuasive. These regulations contain no odor standard, no monitoring of odors and gases. Therefore, the DRC calls for a 5,000-foot setback for barns, lagoons and land application (other than injection) from dwellings, city limits and public places.

(b) Response: The Cabinet agrees that odor issues are one of the major concerns when dealing with CAFOs. The use of siting criteria, including setbacks, sets standards to address odor concerns.

**(30) Subject: Regulate Odors**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
Facilities should not be permitted to create a nuisance by virtue of odor or runoff. A narrative standard preventing these (CAFO) facilities from creating a nuisance by virtue of odor or runoff should be included in the regulations.

(b) Response: The Cabinet agrees that odor issues are one of the major concerns when dealing with CAFOs. With regard to nuisance matters, the Cabinet is not proposing to address this. Nuisance issues are addressed at the local level via planning and zoning and/or health ordinances. Neighbors have common law rights concerning nuisance, which can also be addressed in the courts.

**(31) Subject: Public Notification**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
Thorough and publicly available monitoring and record keeping should be required. Results of all soil and waste analyses should also be submitted to the Cabinet, so that the public will have access to this information prior to permit renewal. Record keeping for land application is essential to determine permit compliance. These records need to be submitted at least quarterly, so that neighbors can find out how much and how often material is being applied near their property.

(b) Response: The permit holder is required to submit a Comprehensive Nutrient Management Plan to the Cabinet, which addresses a number of testing requirements. In the event of a discharge, the operation must monitor the discharge and report the results to the Cabinet within 30 days. All other data must be maintained onsite and made available to a Cabinet representative upon request.

**(32) Subject: Individual Permits**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
Citizens must be guaranteed a realistic opportunity to have input into permitting decisions. DRC urges the Division to issue individual permits to all CAFOs, rather than a blanket general permit. At the very least, individual permits should be required for new and expanding facilities.

(b) Response: The proposed administrative regulation does not address the matter of individual or general KPDES permits. With respect to the processing of KPDES permits, the Cabinet is utilizing a combination of general and individual permits to permit CAFOs in Kentucky. Each operation is evaluated individually to determine whether a general or individual KPDES permit is warranted.

**(33) Subject: Individual Permits**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

DRC is concerned about the use of antibiotics in these CAFOs. An estimated 40 percent of antibiotics produced in the United States is fed to livestock as growth enhancers. A geochemist with the US Geological Survey in Raleigh, NC notes that some antibiotics are getting transported into surface and groundwaters from hog waste lagoons. The potential exists for neighbors to be exposed to pathogens and antibiotics through;

1) Ingestion and contact with surface water (including drinking water supplies) contaminated by runoff of waste applied to the land, emergency discharges from overflowing lagoons during wet weather, and catastrophic lagoon failures; and;

2) Ingestion and contact with groundwater contaminated by seepage from manure storage areas, pits and lagoons, as well as land application, and wind- and air-borne pathogens from land application, and disease vectors, particularly flies carrying disease organisms from such facilities to surrounding areas. There is nothing in the regulation to require even monitoring of the wastes for disease organisms, so neighbors and downstream drinking water plants will not even know the potential risks.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment. The Cabinet does not regulate use of antibiotics in animals. With regard to mice or other rodent infestation problems, individuals should contact the Department of Agriculture, Division of Pests and Weeds (502-575-7162). For health concerns related to mice or other rodents, individuals should contact the Cabinet for Health Services, Department for Public Health (502-564-4856), or the local health department in their area. The proposed administrative regulation is designed to address odor concerns via siting criteria, including setbacks, to protect human health and the environment.

**(34) Subject: Siting Criteria – Karst Protection**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

DRC supports the setbacks in the regulation, with the exception of the setbacks for dwellings, water wells, karst features, and lakes, rivers and streams, which should be more protective. Setbacks are needed for property lines. We also support KFTC members who suggest that the setback for karst features be equal to that of water wells. DRC also supports Western Kentucky residents who have called for and provided written examples of setbacks to Dwellings, Lakes, Streams or Rivers, and Property lines from poultry and swine operation features. DRC urges the Division to retain the five-mile setback distance from a public water supply. In addition, the five-mile setback should be extended to land application areas of large-scale confined swine feeding facilities. Kentucky has many small, under-funded drinking water plants that lack the capacity to detect and treat disease organisms like cryptosporidium that can be present in hog waste.

(b) Response: Setbacks from "karst features" for both physical structures and land application areas have been proposed. The Cabinet has also proposed siting criteria relative to public water supplies.

**(35) Subject: Siting Criteria – Inadequate**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

Inadequate setbacks provide the only protections from disease and odor for neighbors and downwind/downstream communities. Neighbors and those living downstream must be protected

from diseases spread by these facilities. Many citizens have expressed concerns about the potential presence of disease organisms, including bacteria, viruses and parasites in hog and poultry waste from these concentrated feeding operations.

(b) Response: The proposed setbacks are the result of evolving process that the Cabinet has undergone since early 1997. They represent the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(36) Subject: Density Requirements**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
DRC supports the call of CFA, KTFC, and others for density limitations on poultry houses. We urge the Cabinet to examine the impact of concentrations of poultry houses on air and water quality and devise a permanent regulation to protect the public and the environment. Furthermore, the Cabinet should either drop the number of animal units at which regulations come into effect, from 1,000 to 500 (from 100,000 chickens to 50,000), or use a tiered system that would provide some regulations for operations with 500- 1,000 animal units. This is because there are problems stemming from these smaller, yet still industrial operations.

(b) Response: The Cabinet has chosen not to address density of animals allowed. The agency would note that handling of manure in an appropriate manner, both from an agronomic and environmental perspective, will address animal density concerns in many respects.

Further, the setbacks help address the density issue. The number of units is consistent with current federal regulation. Other KPDES regulations govern the ownership of adjacent operations.

**(37) Subject: Additional Regulatory Requirements – Groundwater**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
DRC urges that an adequate groundwater monitoring system be required for the purpose of detecting seepage from hog waste lagoons. Quarterly monitoring for at least two years should be required to establish baseline background levels.

DRC urges that up gradient wells be sited in such a way as to determine background unaffected by hog waste management activities (including land application) at the facility. A narrative standard should require a minimum of three down gradient wells to ensure detection of a potential plume of groundwater contamination. DRC also supports at a minimum, the parameters, including bacterial contamination included in the Cabinet's set of swine feeding operation regulations promulgated several years ago. Based on soil types and hydrogeologic considerations, the Cabinet should also require monitoring for potential groundwater contamination from land application areas.

All results of groundwater testing should be submitted to the Cabinet to ensure that neighbors have access to information about levels of contaminants in groundwater.

(b) Response: The Cabinet has chosen not to require groundwater monitoring as a part of this proposed administrative regulation. Any determination to require such would occur during the actual permitting of the operation.

**(38) Subject: Additional Regulatory Requirements – Disclosure**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

The Cabinet should consider requiring a report of any disease outbreak among the swine and should have the ability to require monitoring of waste for pathogens in such a case, as well as a plan for treatment to destroy pathogens prior to land application or increased setbacks, as necessary.

DRC urges the Cabinet to reconsider imposing the original provisions from the 1997 emergency regulations regarding relatedness, especially with regard to corporate farms and common investors, as well as common land application areas. In addition, permitting needs to take into account the prior past performance (and any current violations) of applicants.

(b) Response: The Cabinet does not regulate the problem of livestock disease. The KPDES permitting process does take into consideration past performance and relatedness.

**(39) Subject: Additional Regulatory Requirements- Land Applications**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

DRC supports requirements that would not allow waste to be land applied on frozen or saturated soil, during a precipitation event, or in excess of the amount needed to provide the nitrogen requirement of the crop being grown. DRC urges the Cabinet to re-impose the requirement that waste not be land applied at a rate exceeding the soil's infiltration capacity. DRC also urges the Cabinet to re-promulgate the requirements that waste be applied on a field for a maximum of three out of four years, and that soil pH be regulated. Both nitrogen and phosphorus levels should be considered in the nutrient management plans.

Land application from these operations should be prohibited in the floodplain and on wetlands. Moreover, DRC contends that a filter strip of vegetation downhill from land application is essential to limit the amount of contaminants in runoff. If the filter strip is intended to "catch" runoff containing hog waste, it should not be permitted to count as part of the setback area, since it will itself be contaminated with hog waste. We also urge the Cabinet to prohibit the land application of hog waste on crops grown for human consumption.

(b) Response: Specifically, the Comprehensive Nutrient Management Plan (CNMP), the Agriculture Water Quality Plan, and any applicable NRCS requirements will be evaluated collectively in the development of an appropriate nutrient management plan for a given CAFO operation.

**(40) Subject: Additional Regulatory Requirements – Pollution Control**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

The regulation should adequately take into account the environmental effects of atmospheric nitrogen deposition. Studies suggest that between 75% and 90% of the nitrogen treated in anaerobic lagoons and land applied volatilizes. A sizeable percentage is redeposited in the region where the facility is located. Evidence indicates that waterways, lakes, and ponds in regions affected by intensive corporate hog farming are likely to suffer greatly from eutrophication and fish kills. These emissions also have a negative effect on native plant species and wildlife habitat. We urge the Cabinet to consider not only the effect of an individual facility, but also the aggregated environmental effects of these facilities.



(b) Response: The Cabinet recognizes the concern with ammonia transport via air deposition to water bodies. The Cabinet would note however, using conservative assumptions that a 1000 animal unit swine operation (for example) would contribute no more than a small fraction of a pound of nitrogen per acre in the area of deposition. Compared to the contributions from mineralization of soil organic matter, nitrogen fixing bacteria, and other sources, the contribution from swine operations would be minor, and would not be expected to negatively affect native plant species wildlife habitat, or significantly increase ambient levels of nitrogen in surface areas.

**(41) Subject: Additional Regulatory Requirements – Pollution Control**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

Lagoons should not be permitted where previous mining activity has created a potential for subsidence. The regulations should prevent the location of lagoons “in an area where a sinkhole or other evidence of subsidence is present. Pursuant to the regulation, (lagoon) dams should be checked for structural integrity, both in the design review, and through inspections once operational. Even with synthetic liners, lagoons must not be allowed to be located in the saturated zone. They should not be permitted in regions with karst topography. In addition, allowing a discharge during a 25-year/24-hour storm is inadequate.

(b) Response: The proposed administrative regulation prohibits lagoons where a sinkhole, enclosed depression, or subsidence is evident. The construction of an animal waste lagoon requires a construction permit consistent with 401 KAR 5:005. These structures are required to conform with applicable state and federal regulations and design requirements. The 25-year/24-hour discharge allowance is not a part of this proposed administrative regulation. Rather, it is a part of the other KPDES regulations dealing with CAFOs.

**(42) Subject: Integrator Liability – Support**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center

DRC strongly supports the provisions making corporate integrators responsible for environmental compliance at confined animal feeding operations. We believe this is the single most important provision for environmental protection in the state and for the protection of farmers, neighbors, and taxpayers. The federal government has recognized the importance of integrator liability, and their proposed regulations require “processors that exercise substantial operational control over contract growers to be co-permitted.” Corporate integrators dictate how the animals are fed, housed, and managed. The integrators have significant input into how the animals are raised, waste management and ventilation systems, and the siting of the facilities. These integrators who control and profit from the operations, must be responsible for environmental compliance and liability.

Without integrator liability, growers will be solely responsible for clean-up costs in the case of environmental damage. If the grower cannot afford the costs, the burden will be placed on Kentucky taxpayers. DRC supports the Division’s decision to incorporate integrator liability into the regulations. DRC also supports members of KFTC and CFA who propose even stronger integrator liability language. For instance, the Cabinet could hold the corporate integrators liable for up to 10 years after a contract ends or a facility is closed. This would ensure that any environmental damage caused by the CAFO that is found within 10 years of the end of the contract or closure will be the responsibility of the grower and the corporation. The Cabinet

could also require CAFOs to file a closure plan and post a bond to cover the cost of proper closure.

(b) Response: The Cabinet agrees that co-permitting is an important aspect of the CAFO permit program. The proposed administrative regulation is necessary to set forth a “bright line test” for integrator liability and to standardize Best Management Practices by creating specific setbacks for the permits. They are in accordance with the federal Clean Water Act requirements.

**(43) Subject: Lenient Regulations - Loopholes**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
DRC urges the Cabinet to look closely at the regulation and close loopholes, which may let some CAFOs off the hook. For instance, in Western Kentucky several community members have heard about growers splitting property titles of different poultry houses among family members in order to get around the 1,000 animal unit threshold. The Cabinet should find ways to close loopholes such as this.

(b) Response: The Cabinet notes the comment. The Cabinet evaluates the related nature of the operations to determine whether operations might otherwise be deemed to be CAFOs.

**(44) Subject: Manure Management and Responsibility**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
Comprehensive nutrient management plans, that require waste and soil testing for phosphorous, nitrogen, and any heavy metals likely to be present, should be required.

Growers and integrators should be required to demonstrate that the waste will be handled in a responsible manner. Waste cannot be over-applied to fields or applied on frozen ground when it cannot be saturated. Also, some mechanism (written agreement/contract) is needed to ensure that growers don’t give waste to people who will handle it irresponsibly. The buyer agrees to abide by the regulations and the setbacks, if the manure is to be stored or applied within Kentucky.

(b) Response: The Comprehensive Nutrient Management Plan (CNMP), Agriculture Water Quality Plan, and any applicable NRCS requirements will be evaluated collectively in the development of an appropriate nutrient management plan for a given CAFO operation. This includes the proper land application of animal waste, and any off-site distribution of animal waste.

**(45) Subject: Manure Management and Responsibility**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
Many community members have complained about the problem of dead chicken carcasses that are housed and spread with the chicken litter. Some mechanism is needed to ensure that chicken carcasses are housed and disposed of in a way that does not pose threats to human health either through water supplies or obnoxious odors.

(b) Response: The State Veterinarian, pursuant to state statute KRS Chapter 263, regulates dead animal issues.

**(46) Subject: Poultry CAFO Exemptions**

(a) Comment: Heather Roe Mahoney, Democracy Resource Center  
DRC notes the Division's decision to exempt poultry CAFOs existing before February 14, 2000, from the siting requirements for dry litter storage facilities. However, we urge the Division to require these facilities meet the siting requirements as much as possible.

(b) Response: In the interest of fairness and economy, the Cabinet has balanced farming interest and environmental interest and permitted these structures to remain.

**(47) Subject: Stringency**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation  
Contrary to NREPC's steadfast interpretation, Kentucky Farm Bureau believes this proposed regulation violates Kentucky Revised Statutes (KRS) 13A.120 prohibiting state laws and regulations based on federal law from being more stringent than federal law requires. In addition, it is contrary to KRS 224.16-050(4) prohibiting the Cabinet from imposing conditions in connection with Kentucky Pollutant Discharge Elimination System (KPDES) permits that are more stringent than could be imposed under federal law.

(b) Response: This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations

**(48) Subject: Statutory Authority**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation  
On its face, the proposed regulation, as well as previous CAFO regulations and corresponding permits, clearly state their basis on the federal Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit program. Despite USEPA's delegation of authority to the division to manage and issue NPDES permit via the KPDES program, NREPC is still constrained by state regulatory construction limitations. Further, NREPC's general KRS 224 charge to protect the state's natural resources does not supercede KRS 13A limitations and allow the division to incorporate additional state requirements into what is otherwise a federal program. The division stands in the same position as USEPA; no more, no less.

(b) Response: This proposed administrative regulation relates to KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110, 224.20-120, 224.70-100, 224.70-110, and 33 U.S.C. § 1342 and the statutory authority for the proposed administrative regulation is KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110 and 33 U.S.C. § 1342. The proposed administrative regulation is based on more than the federal Clean Water Act. This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.

This proposed administrative regulation is not issued only pursuant to the federal Clean Water Act. The proposed administrative regulation is also issued pursuant to the Cabinet's authority under KRS 224.20-110, which gives the Cabinet authority to regulate air pollution, and pursuant to KRS 224.10-100(5), which gives the Cabinet authority to provide for the prevention of odor problems.

**(49) Subject: Statutory Authority**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation

Unfortunately, we presume that NREPC maintains its position that federal guidance documents support many of the regulation's provisions. However, federal case law shows that USEPA guidance documents are not law or regulation, Appalachian Power Co. v. EPA 208 F.3d 1015, 1028 (D.C. Cir. 2000). Guidance documents are intended to operate as recommendations to delegated states as to what they might do to expand on the minimum requirements of federal law. In Kentucky's case, state law prohibits expansion of existing federal requirements.

(b) Response: The EPA administrator issues information and guidelines to the states in administering their programs. While guidance documents are not "regulation" or "law", they serve to show how EPA interprets its program and would issue a permit.

**(50) Subject: Integrator Liability - Unlawful**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation

By including a bright-line test for defining "operator" in the proposed regulation, the division again exceeds the existing federal law relating to integrator/contractual co-liability for the permit program. The only existing federal standard for co-liability is clearly set out in case law, US EPA guidance documents and even in the proposed changes to the federal NPDES permit program for CAFOs. The current federal standard for co-liability exists only for entities "individually exercise(ing) an authority which directly or indirectly controls the discharge of pollutants." Love v New State Department of Environmental Conservation, 529 F. Supp. 832, 842 (S.D.N.Y. 1981) (emphasis supplied); Montgomery County Environmental Coalition v. Fri, 366 F. Supp. 261, 266-267 (D.D.C. 1973) (40 CFR 122.21(a), rejects the substantial control test extending the obligation to obtain a permit to "[a]ny person who discharges or proposes to discharge pollutants"). Clearly, USEPA knows that the level of operational control must be determined on a case-by-case basis with consideration given to a number of factors.

(b) Response: The Cabinet has used its regulatory authority to set forth a "bright line test" to guide the parties as to when an integrator is deemed to have substantial operational control and is therefore considered an operator.

EPA is in agreement with the Cabinet that existing federal regulations create liability on the part of the integrators who meet the test set forth in the proposed administrative regulation. The EPA administrator issues information and guidelines to the states in administering their programs. While guidance documents are not "regulation" or "law", they serve to show how EPA interprets its program and would issue a permit.

**(51) Subject: Integrator Liability - Unlawful**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation

Accordingly, NREPC continues to act outside its jurisdiction and authority by promulgating a CAFO KPDES permit regulation that exceeds federal requirements for integrator/contractual co-liability.

(b) Response: This proposed administrative regulation relates to KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110, 224.20-120, 224.70-100, 224.70-110, and 33 U.S.C. § 1342 and the statutory authority for the proposed administrative regulation is KRS

224.10-100, 224.16-050, 224.20-110, 224.70-110 and 33 U.S.C. § 1342. The proposed administrative regulation is based on more than the federal Clean Water Act.

This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.

**(52) Subject: Siting Criteria - Setbacks**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation

The proposed regulation includes CAFO siting requirements and setbacks that are not required in existing federal law. Under the guise of the Clean Water Act, and by its own admission, the Division addresses nuisance and odor issues in the proposed regulation that are not appropriate or required elements for the federal point-source water discharge permits. Again, the standard for NPREC is what the federal law requires (i.e., what USEPA can do), not what the USEPA allows any other state to do so long as minimum federal requirements are met. NREPC has violated the KRS 13A.120 and KRS 224.16-050(4) limitations and gone outside its jurisdiction by effectively regulating land-use planning with the inclusion of siting criteria and setbacks for odor in the proposed KPDES regulation.

(b) Response: This proposed administrative regulation relates to KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110, 224.20-120, 224.70-100, 224.70-110, and 33 U.S.C. § 1342 and the statutory authority for the proposed administrative regulation is KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110 and 33 U.S.C. § 1342. The proposed administrative regulation is based on more than the federal Clean Water Act. This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.

In addition to its Clean Water Act authority the Cabinet has additional statutory authority to regulate these facilities and operators throughout the state and regardless of size. This authority can be relied upon in issuing the proposed administrative regulation. The Cabinet has authority to regulate odors pursuant to KRS 224.20-100, 224.20-110, and 224.10-100.

**(53) Subject: Siting Criteria - Setbacks**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation

NREPC exceeds its authority and jurisdiction by including setbacks and siting criteria for the land application of animal waste on the crops and pasture owned by the CAFO operator(s). Neither USEPA nor the NREPC have the authority to regulate agricultural crop/pasture runoff using the federal point source permits. The Clean Water Act unequivocally defines agricultural crop/pasture runoff as a nonpoint source of pollutants, and thus not subject to direct federal or federally delegated jurisdiction, 33 U.S.C. 1362(14).

(b) Response: Cultivated crop areas that are associated with Concentrated Animal Feeding Operations are considered point sources pursuant to 33 USC Section 1362. CAFOs are clearly defined in federal law as KPDES “point sources.” 33 U.S.C. Section 1362 defines “point source” as follows:

The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch,

channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharge and returns flows for irrigated agriculture. 33 U.S.C. Section 1362(14).

A CAFO meets the definition of point source. Congress did not define “concentrated animal feeding operations”, but EPA has done so in the Code of Federal Regulations. Any operation that meets that definition is a “point source”. It thus becomes a facility or activity regulated by the CWA. EPA considers anyone who owns animals at a CAFO or provides operational direction at the CAFO to be the owner or operator of the CAFO.

The proposed administrative regulation is based on more than the federal Clean Water Act. This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.

This proposed administrative regulation also relates to KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110, 224.20-120, 224.70-100, 224.70-110, and 33 U.S.C. § 1342 and the statutory authority for the proposed administrative regulation is KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110 and 33 U.S.C. § 1342.

**(54) Subject: Stringency**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation

KY Farm Bureau has serious policy concerns about NREPC’s duty as an executive branch agency. When NREPC acts in its regulatory capacity, it cannot exceed the statutory authority, jurisdiction, or limitations set by the legislative branch. Department for Natural Resources and Environmental Protection v. Stearns Coal and Lumber Company, Ky, 563 S.W.2d 471 , 473 (1978) (“the Cabinet cannot” add to the requirements established by the legislature for the issuance of a permit ...”); Natural Resources & Environmental Protection Cabinet v. Pinnacle Coal Corp., KY., 729 S.W.2d 438, 439 (1987) (Cabinet cannot “adopt regulations in conflict with plain statutory provisions.”) We strongly urge the division to consider these limitations and weigh the interests of all Kentuckians when exercising its discretion. In maintaining the regulation in its current form, Kentucky Farm Bureau believes that NREPC has acted contrary to state and federal legislative intent and abused its authorized agency discretion.

(b) Response: This proposed administrative regulation relates to KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110, 224.20-120, 224.70-100, 224.70-110, and 33 U.S.C. § 1342 and the statutory authority for the proposed administrative regulation is KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110 and 33 U.S.C. § 1342. The proposed administrative regulation is based on more than the federal Clean Water Act. This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.

In addition to its Clean Water Act authority the Cabinet has additional statutory authority to regulate these facilities and operators throughout the state and regardless of size. This authority can be relied upon in issuing the proposed administrative regulation. The Cabinet has authority to regulate odors pursuant to KRS 224.20-100, 224.20-110, and 224.10-100.

**(55) Subject: Stringency**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation

The Division continues to succumb to the agenda pressures and exaggerated, often unsubstantiated, concerns of a vocal minority. At the same time, the division has yet to address or acknowledge the very legitimate concerns of Kentucky's livestock farmers, as well as the communities that depend on this rural, agricultural economy. Unfortunately, NREPC has allowed the CAFO regulation process to be driven by extreme social, moral and political agendas, rather than sound science and realistic, reasonable environmental protection. So, since these considerations are influencing the regulation's structure, livestock producers and their dependent communities expect that the Division will begin to consider and incorporate our social, political, moral, legal and economic concerns into and all any CAFO rules.

(b) Response: The Cabinet has received a broad range of input from interests on all sides of this issue including citizens, commodity groups, business organizations, environmental groups, local government, academic institutions, and various state and federal government agencies. The Cabinet appreciates the willingness of these various interests to work toward the development of reasonable environmental regulations. However, it has been very difficult to reach broad consensus among the various interests. The proposed administrative regulation provides appropriate protection of human health and the environment.

**(56) Subject: Stringency**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation

Kentucky's previous regulation and current proposed regulation's inclusion of co-liability places our livestock farmers at a serious disadvantage to producers in other states. Already, the beef cattle industry has lost business as a result of out-of-state entities' concern over the KPDES permit program's potential for liability and uncertain enforcement. We ask that the Division recognize and consider the economic stability and competitiveness of Kentucky's farmers.

Similarly, by establishing overly restrictive setbacks and siting requirements, NREPC precludes the reasonable expansion, even establishment, of livestock operations by Kentucky farmers. Regardless of its intention and without any statutory jurisdiction, NREPC is effectively regulating economic viability and social policy for Kentucky agriculture. We ask that the Division stay within its charge of protecting the natural resources of our state.

(b) Response: The Cabinet is aware of the economic stability and need for Kentucky farmers to stay competitive. Concerns over the beef cattle industry are unfounded. The Cabinet is aware of very few beef producers who may qualify as a CAFO. In some cases, loss of out-of-state contracts may be due to misinformation, rather than legitimate concerns.

The Cabinet disagrees that setbacks and siting requirements are overly restrictive. The Cabinet recognizes the importance of the livestock industry to the economy of the Commonwealth. However, the importance of protecting and conserving Kentucky's environment is equally important to the citizens of the state. EPA expects each delegated state to use their NPDES programs to regulate CAFOs (existing federal regulations mandate NPDES permits for CAFOs). The Cabinet will strive as much as possible to prevent duplication of effort and will attempt to integrate the issuance of KPDES permits into an overall animal waste strategy.

The proposed setbacks are the result of evolving process that the Cabinet has undergone since early 1997. They represent the Cabinet's Best Professional Judgement of what is needed to

protect human health and the environment at this time. The Cabinet used all available resources to determine what setback distances would be reasonable to protect both human health and the environment.

**(57) Subject: Stringency**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation

The clear terms of proposed regulations negate any well-meaning intent on behalf of the current NREPC or division staff. Today, tomorrow or years from now any livestock operation in the state could be “designated” a CAFO at the discretion of the division (i.e., division director’s regulatory discretion to designate operations of less than 1,000 animal units). Further, CWA citizen suite provisions mean that NREPC may be legally compelled to issue permits to the livestock operations never before intended or counted as Kentucky CAFOs. If NREPC truly does not intend to ever enforce this regulation against specific sectors or scales of production, the division must guarantee this by specifically exempting these groups from the regulation.

(b) Response: With respect to the Cabinet's "well-meaning intent", the Division has not proposed or finalized any provision in an emergency or ordinary administrative regulation since this process started in 1997 that establishes the ability to "designate" an operation as a CAFO at the discretion of the Cabinet. The existing state KPDES regulations govern the designation process.

**(58) Subject: Stringency**

(a) Comment: Rebeckah T. Freeman, KY Farm Bureau Federation

Kentucky Farm Bureau wants to set aside the ongoing contentiousness of this issue in order to work with NREPC and all other interested parties to arrive at a workable solution for the KPDES permitting of CAFOs and designated AFOs. Our members sincerely care about Kentucky’s environment and our quality of life, and do not oppose lawful, reasonable regulations and permits. Unfortunately, we continue to strongly believe that this proposed regulation is neither lawful nor reasonable.

(b) Response: The Cabinet has received a broad range of input from interests on all sides of this issue including citizens, commodity groups, business organizations, environmental groups, local government, academic institutions, and various state and federal government agencies. The Cabinet appreciates the willingness of these various interests to work toward the development of reasonable environmental regulations. However, it has been very difficult to reach broad consensus among the various interests. The proposed administrative regulation provides appropriate protection of human health and the environment.

**(59) Subject: Stringency**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

The proposed regulation is more stringent than applicable federal law and regulations in violation of KRS 224.16-050 and KRS 13A.120(a).

(b) Response: This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.



**(60) Subject: Stricter Than Federal Mandate**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

In its response to comments on the expired regulation, the cabinet indicated it intended to apply the regulation to all poultry operations within excess of 100,000 chickens at a facility. It does not appear that the cabinet has changed its position on this issue. Because the poultry operations in Kentucky are overwhelmingly dry-litter systems, the proposed regulation encompasses poultry operations that do not come within the definition of a CAFO under the federal Clean Water Act and its current implementing federal regulations. Accordingly, the proposed regulation is more stringent than the applicable federal law.

(b) Response: The proposed administrative regulation does not address this issue. Each poultry operation is evaluated on a case-by-case basis during the permitting process administered under the existing KPDES regulations. In addition, in the USDA/USEPA's Draft Guidance Manual and Examples of NPDES Permits for Concentrated Animal Feeding Operations, August 6, 1999, the EPA at Section 2.3.2 notes that poultry operations that remove dry litter waste from pens and stack it in areas exposed to rainfall may be considered to have established a crude liquid manure system. This reflects EPA's interpretation of its program and indicates how EPA would issue federal NPDES permits.

This proposed administrative regulation is not issued only pursuant to the federal Clean Water Act. The proposed administrative regulation is also issued pursuant to the Cabinet's authority under KRS 224.20-110, which gives the Cabinet authority to regulate air pollution, and pursuant to KRS 224.10-100(5), which gives the Cabinet authority to provide for the prevention of odor problems.

**(61) Subject: Stringency**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

The proposed state regulation attempts to regulate the land application of wastes from CAFOs even though the application sites are not encompassed by the definition of a CAFO and are not point sources that discharge pollutants into the waters of the Commonwealth. The Clean Water Act's NPDES permitting requirements apply only to point sources that discharge or have the potential to discharge pollutants into navigable waters. Accordingly, the proposed regulation is more stringent than the applicable federal law.

(b) Response: Cultivated crop areas that are associated with Concentrated Animal Feeding Operations are considered point sources pursuant to 33 USC Section 1362. CAFOs are clearly defined in federal law as KPDES "point sources." 33 U.S.C. Section 1362 defines "point source" as follows:

The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharge and returns flows for irrigated agriculture.  
33 U.S.C. Section 1362(14).

A CAFO meets the definition of point source. Congress did not define “concentrated animal feeding operations”, but EPA has done so in the Code of Federal Regulations. Any operation that meets that definition is a “point source”. It thus becomes a facility or activity regulated by the CWA.

**(62) Subject: Unlawful Regulation**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

The proposed regulation unlawfully extends the permitting requirement, and the accompanying liability, to persons who are neither owners nor operators of a CAFO. The Clean Water Act only requires persons who are discharging or proposing to discharge pollutants into navigable waters to obtain an NPDES [KPDES] permit. Moreover, the United States Supreme Court, in analyzing the status of a person as an operator for liability pursuant to another environmental statute, has confirmed that persons who do not have control over a pollutant cannot be liable as an “operator”. U.S. v. Bestfoods, 118 S. Ct. 1876 (1998). Accordingly, the proposed regulation is more stringent than the applicable federal law.

(b) Response: Cultivated crop areas that are associated with Concentrated Animal Feeding Operations are considered point sources pursuant to 33 USC Section 1362. CAFOs are clearly defined in federal law as KPDES “point sources.” 33 U.S.C. Section 1362 defines “point source” as follows:

The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharge and returns flows for irrigated agriculture.

33 U.S.C. Section 1362(14).

A CAFO meets the definition of point source. Congress did not define “concentrated animal feeding operations”, but EPA has done so in the Code of Federal Regulations. Any operation that meets that definition is a “point source”. It thus becomes a facility or activity regulated by the CWA. EPA considers anyone who owns animals at a CAFO or provides operational direction at the CAFO to be the owner or operator of the CAFO.

The Cabinet has used its regulatory authority to set forth a “bright line test” to guide the parties as to when an integrator is deemed to have substantial operational control and is therefore considered an operator. EPA is in agreement with the Cabinet that existing federal regulations create liability on the part of the integrators who meet the test set forth in the proposed administrative regulation.

**(63) Subject: Stringency**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

The proposed regulation adopts a single factor bright line “substantial control” test for identifying operators who must apply for, and become liable for violating, a KPDES permit. The current corresponding federal regulations do not contain such a bright line test nor does the Clean Water Act itself. Moreover, the “substantial control” factors set forth in the proposed regulation do not establish control of the discharge of a pollutant as required by the Clean Water

Act for permitting purposes. Accordingly, the proposed regulation is more stringent than the applicable federal law.

(b) Response: The Cabinet has used its regulatory authority to set forth a “bright line test” to guide the parties as to when an integrator is deemed to have substantial operational control and is therefore considered an operator. EPA is in agreement with the Cabinet that existing federal regulations create liability on the part of the integrators who meet the test set forth in the proposed administrative regulation.

The EPA administrator issues information and guidelines to the states in administering their programs. While guidance documents are not “regulation” or “law”, they serve to show how EPA interprets its program and would issue a permit. Therefore, this proposed administrative regulation is not more stringent than federal law or regulations.

**(64) Subject: Stringency**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

The proposed regulation contains siting and setback requirements to be incorporated into the KPDES permit that are not in existing corresponding federal statutes or regulations. Accordingly, the proposed regulation is more stringent than the applicable federal law.

(b) Response: This proposed administrative regulation relates to KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110, 224.20-120, 224.70-100, 224.70-110, and 33 U.S.C. § 1342 and the statutory authority for the proposed administrative regulation is KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110 and 33 U.S.C. § 1342. The proposed administrative regulation is based on more than the federal Clean Water Act. This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.

**(65) Subject: Stringency**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

The proposed regulation requires litter sheds for poultry operations. The Clean Water Act and its implementing regulations do not require sheds. Accordingly, the proposed regulation is more stringent than the applicable federal law.

(b) Response: In addition to its Clean Water Act authority the Cabinet has additional statutory authority to regulate these facilities and operators, throughout the state and regardless of size. This authority can be relied upon in issuing the proposed administrative regulation.

This proposed administrative regulation relates to KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110, 224.20-120, 224.70-100, 224.70-110, and 33 U.S.C. § 1342 and the statutory authority for the proposed administrative regulation is KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110 and 33 U.S.C. § 1342. The proposed administrative regulation is based on more than the federal Clean Water Act. This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.

**(66) Subject: Statutory Authority**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

The proposed regulation has been promulgated in the wake of the expiration of 401 KAR 5:072 which was found to be deficient by two legislative committees, the Administrative Regulation Review Subcommittee and the Interim Joint Committee on Agricultural and Natural Resources on August 1, 2000 and August 24, 2000 respectively. The Committees determined that 401 KAR 5:072 failed to comply with federal law. Accordingly, pursuant to KRS 13A.333(2), 401 KAR 5:072 expired upon adjournment of the next regular session of the General Assembly. Thus, when the General Assembly adjourned on March 23, 2001 401 KAR 5:072 expired.

(b) Response: This proposed administrative regulation complies with KRS 13A.333(6). The Cabinet has filed post-judgement motions in the Franklin Circuit Court and is awaiting a ruling on the matter.

**(67) Subject: Unlawful Regulation**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

Section 2 of the proposed regulation, 401 KAR 5:074 retains a “bright line” test, couched now as a “substantial operational control” test. The most significant change in the bright line test of the expired regulation relates to the ownership of the animals. As written in the expired regulation, a person who owned a single animal at a facility could be considered an operator for permitting purposes. The currently proposed regulation provides that someone who “owns all, or a significant percentage of, the animals” must be considered an owner. Neither test in either regulation comports with governing federal law.

(b) Response: The Cabinet has used its regulatory authority to set forth a “bright line test” to guide the parties as to when an integrator is deemed to have substantial operational control and is therefore considered an operator. EPA is in agreement with the Cabinet that existing federal regulations create liability on the part of the integrators who meet the test set forth in the proposed administrative regulation.

The EPA administrator issues information and guidelines to the states in administering their programs. While guidance documents are not “regulation” or “law”, they serve to show how EPA interprets its program and would issue a permit. Therefore, it is not more stringent than federal law or regulations.

**(68) Subject: Integrator Liability - Unlawful**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

Incredibly, an integrator who owns the animals and contracts with the owner of a CAFO to raise them at the CAFO, under this regulation may become solely liable for the pollutants discharged activities of the owner of the CAFO even if he has no involvement at all in those activities.

(b) Response: The Cabinet has used its regulatory authority to set forth a “bright line test” to guide the parties as to when an integrator is deemed to have substantial operational control and is therefore considered an operator.

EPA is in agreement with the Cabinet that existing federal regulations create liability on the part of the integrators who meet the test set forth in the proposed administrative regulation. The EPA administrator issues information and guidelines to the states in administering their programs. While guidance documents are not “regulation” or “law”, they serve to show how

EPA interprets its program and would issue a permit. Therefore, it is not more stringent than federal law or regulations.

**(69) Subject: Unlawful Regulation**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

The Cabinet should not disregard the plain finding of the Franklin Circuit Court in its May 25, 2001 Opinion and Order in which it expressly considered whether 401 KAR 5:074E, which the Cabinet now proposes to make permanent as 401 KAR 5:074, was “substantially similar” to 401 KAR 5:072 and therefore in violation of KRS Chapter 13A.

(b) Response: The Cabinet has filed post-judgement motions in the Franklin Circuit Court case and is awaiting a ruling on the matter.

**(70) Subject: Statutory Authority**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

Although the Notice of Intent, as well as Section 1 of the proposed regulation, expressly state that the subject matter of the administrative regulation to be promulgated is “KPDES permit conditions for beef, dairy, poultry and swine concentrated animal feeding operations,” the Cabinet continues to cite, as authority for the regulation, state unrelated to the KPDES permitting process and the federal acts delegating the KPDES permitting process to Kentucky. Those statutes (KRS 224.10-100, 224.20-110 and 224. 70-110), however do not involve KPDES permitting and, therefore, cannot give authority for the KPDES permitting of CAFOs, the avowed subject matter of the regulation.

(b) Response: In addition to its Clean Water Act authority the Cabinet has additional statutory authority to regulate these facilities and operators throughout the state and regardless of size. This authority can be relied upon in issuing the proposed administrative regulation.

**(71) Subject: Unlawful Regulation**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

Moreover, nothing in the cited general state statutes gives an executive agency the authority to impose liability on a person who has no involvement in the activity that is subject to regulation, i.e. the discharge of pollutants into waters of the Commonwealth.

(b) Response: The Cabinet has used its regulatory authority to set forth a “bright line test” to guide the parties as to when an integrator is deemed to have substantial operational control and is therefore considered an operator.

EPA is in agreement with the Cabinet that existing federal regulations create liability on the part of the integrators who meet the test set forth in the proposed administrative regulation. The EPA administrator issues information and guidelines to the states in administering their programs. While guidance documents are not “regulation” or “law”, they serve to show how EPA interprets its program and would issue a permit.

**(72) Subject: Loss of Small Farms in Kentucky**

(a) Comment: Judith A. Villines, Stites & Harbison Attorneys

The Cabinet's approach as evidence in the proposed regulation is poor public policy, and, in fact, will inevitably contributed to the end of the small farm way-of-life in Kentucky (an effect surely not intended). Currently, small family farmers in Kentucky have been able to retain their farms because they have entered into contracts with poultry producers to raise their chickens for them. Significantly these farmers have been able to continue operating their farms on a profitable basis and can even sell their litter as a by-product. By placing onto the owner of the animals full liability for actions of the farm owner relating to discharge of pollutants, the Cabinet assures that one or two things will occur: either (1) the producers will not enter into contracts with farmers without provisions giving the producer absolute control of all the farmer's activities in order to minimize the producer's potential liability, or (2) the producers will move their animals to other states.

Significantly, other states, although subject to the same provisions of federal law, recognize the current federal law neither permits nor allows the unreasonable permitting and vicarious liability requirements of either the expired or the proposed regulation, and have not imposed conditions similar to those in the proposed regulation without express state statutory authority.

(b) Response: The proposed administrative regulation does not affect the small family farmer who maintains less than 1000 animal units unless designated on a case-by-case basis. The Cabinet disagrees that corporate agriculture will leave Kentucky. The co-permitting provision is designed to ensure proper protection of human health and the environment.

The provision allowing an operation to be designated as a CAFO is not a provision of the proposed administrative regulation. Rather, it is a provision of other KPDES regulations that have been in effect for years.

The Cabinet recognizes the importance of the livestock industry to the economy of the Commonwealth. However, the importance of protecting and conserving Kentucky's environment is equally important to the citizens of the state. EPA expects each delegated state to use their NPDES programs to regulate CAFOs (existing federal regulations mandate NPDES permits for CAFOs). The Cabinet will strive as much as possible to prevent duplication of effort and will attempt to integrate the issuance of KPDES permits into an overall animal waste strategy.

**(73) Subject: Unlawful Regulation**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

The proposed regulation states that the siting guidelines are effective for buildings built after February 14, 2000. Should not this date be the day that this set of proposed regs were issued – June 14, 2001? Since all previous versions were found to be deficient or void by the courts, there were periods of time when there was no regulation proposed between February 14, 2000 and the current issue date. Therefore, unless the date is changed, new siting guidelines can be applied to existing buildings that were constructed legally at the time of construction (in the interim). This is unfair and can result in the illegal taking of property.

(b) Response: CAFO regulations have been effective since February 14, 2000. The date is appropriate.

**(74) Subject: No Need for Regulations**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

When we started this process, the supporters of your failed regulations said that the regs were needed because the implementation of the Ag Water Quality Plans was three years off. We now are only three MONTHS from the Agricultural Water Quality Act being fully implemented. The already existing regs and Ag Water Quality Authority Plan addresses the current situation.

(b) Response: The BMPs required under the Agriculture Water Quality Plan will be given the opportunity to work. The BMP requirements in KPDES permits issued to CAFOs are equivalent to the Agriculture Water Quality Plan. However, the Agriculture Water Quality Act, KRS Subchapter 224.71 is a state statute pursuant to state only authority and not pursuant to the Clean Water Act. Independent of that statute, the Cabinet has responsibility pursuant to KRS 224.16-050(1) to administer the provisions of the Clean Water Act 33 U.S.C. 1251, et seq. The Agriculture Water Quality Act is not stringent enough to meet the requirements of the federal Clean Water Act. It does not, for example, govern the issuance of NPDES permits required by the Clean Water Act. Thus relying on it alone would violate the provisions of the Clean Water Act found in 33 U.S.C. 1370.

**(75) Subject: Odor Control**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

The Kentucky Poultry Federation agrees with the Cabinet in their June 29 response that the dry nature of the poultry litter (provided it is kept dry) lends itself to less odor than does wet manure, and that siting distances are addressed in the Ag Water Quality Plan – Best management Practices #17.

(b) Response: The Cabinet notes the comment.

**(76) Subject: Permanent Litter Storage**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

Poultry farmers are trying to be good citizens of Kentucky. Many of our farmers have litter storage buildings or have applied for cost-share dollars to build them. There are some who would attack the use of cost-share money. However, litter storage sheds are mandated by the state through both the Agriculture Water Quality Authority and the Cabinet of Natural Resources' emergency regulations. This was an unfounded mandate because it eliminated other effective and safe storage methods that are less costly.

(b) Response: In order to protect human health and the environment, it was determined that permanent litter storage at poultry CAFOs was necessary. This is also a requirement of the Agriculture Water Quality Plan for all poultry operations on greater than 10 acres. A typical 4-house broiler operation of approximately 100,000 broilers (minimum size of a CAFO) may entail a start up cost of \$500,000 for the production of broilers alone. The poultry industry did not, however, properly plan for the handling of poultry litter during the build-out phase of the contract growers.

The failure to properly address this essential aspect of the poultry production process has led to numerous complaints ranging from water and odor concerns to flies and rodent concerns. The cost of litter storage structures (less than 5% of start up costs) or other effective and safe storage methods if available, could easily have been incorporated into the initial start up cost had

the poultry industry required this of contract growers during the build-out phase. However, the question of whether state cost-share dollars should be spent on litter storage sheds is not a part of this proposed regulation.

**(77) Subject: Individual Permits**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

Another point to consider is whether the Cabinet continues to maintain that a facility is a CAFO once the litter storage facility is built and being used. At this point, the litter is placed in the storage facility and not on the ground or in contact with rain, therefore eliminating the argument that this is a wet system. The industry would appreciate some clarification on the issue of a need for a KPDES permit, which is a water discharge permit, if there is no discharge.

(b) Response: The proposed administrative regulation does not address this issue. Each poultry operation is evaluated on a case-by-case basis during the permitting process administered under the existing KPDES regulations.

**(78) Subject: Unlawful Regulation**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

Throughout your (Cabinet's) responses to questions brought up at past hearings concerning AFO and CAFO regulations, you say that it is not the responsibility of the Cabinet to regulate nuisances. Is not odor a nuisance? Yet, you state that the regulations are designed to regulate odor?

(b) Response: The Cabinet does not determine what a legal nuisance is for the purpose of a civil lawsuit based on nuisance. The Cabinet has authority to regulate odors pursuant to KRS 224.20-100, 224.20-110, and 224.10-100.

**(79) Subject: No Emergency**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

The Kentucky Poultry Federation continues to ask, "What is the emergency that you must issue new regulations when the other regulations have just expired?" The continual abuse of power to issue emergency regs by the Cabinet should strike fear in the hearts of all Kentuckians. In the last year, the state of Kentucky has had environmental catastrophes such as leaking radiation from a plant, a world record coal slurry spill and burning whiskey that killed fish for miles in the Kentucky River. Yet, what emergency are we addressing here?

(b) Response: Governor Paul Patton declared the Statement of Emergency on February 11, 2000. As the Statement of Emergency notes, "Changes in the beef, dairy, poultry, and pork industries have brought a heightened federal interest in concentrated animal feeding operations nationwide. This has created an urgent need to update the federally delegated Kentucky Pollutant Discharge Elimination System (KPDES) permitting program. In addition, the United States Environmental Protection Agency has published a draft administrative regulation governing concentrated animal feeding operations in the Federal Register, and is under a federal consent decree to finalize that administrative regulation. Therefore, in order to protect human health and the environment, an emergency administrative regulation must be placed into effect immediately". Governor Patton ordered the Natural Resources and Environmental Protection



Cabinet to develop the proposed administrative regulation to protect human health and the environment.

There are waters in Kentucky with moderate to significant water quality impairment attributed to agriculture impacts. The 2000-2001 update to the Kentucky Report to Congress on Water Quality provides the Division of Water's most recent assessment of water quality conditions and trends. This update reflects changes from the most recent monitoring data developed for the Kentucky, Salt, and Licking River Basins. Agriculture continues to be a significant source of nonsupport of beneficial waterbody use. For those waters assessed, agricultural related pollution was the attributed cause of nonsupport in 1,286 miles of streams and 9,050 acres of lakes in Kentucky. The Cabinet maintains that this administrative regulation is an integral part of addressing the water quality problems remaining in Kentucky's water bodies.

**(80) Subject: Stringency**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

The legislature has found the former proposed regs deficient, yet the Cabinet abuses the laws of the state of Kentucky by issuing more emergency regulations that again are more stringent than the Federal regulations.

(b) Response: This proposed administrative regulation is consistent with federal law and regulations and it is based upon additional state statutory authority found in KRS Chapter 224. Therefore, it is not more stringent than federal law or regulations.

**(81) Subject: Unlawful Regulation**

(a) Comment: Carole Knoblett, Kentucky Poultry Federation

The new 2001 version of the emergency regulation is not substantially different than the expired regs.

(b) Response: This proposed administrative regulation complies with KRS 13A.333(6). The Cabinet has filed post-judgement motions in the Franklin Circuit Court case and is awaiting a ruling on the matter.

**(82) Subject: Groundwater**

(a) Comment: Charles Bates, Concerned Citizen

I work in groundwater. I live with groundwater every day. In McLean County, we had a coal mine to closes because they broke into a vast bunch of water where people had straight-lined their sewer into the old works for years. As a result of this, the mine closed. What I have come to understand is, many places where these CAFOs have been before, this stuff is in the groundwater. We have water coming in the mines. We can easily find out where it's coming from, because we walk around the surface and we put out dye, and where these different dye points are, are different colors. So, we know where it is coming from. And in the coal mine where I work, we will have an air shaft in close proximity to multiple chicken houses. So, not only will we be breathing the air, sucking this air in, we will also be experiencing the (ground) water coming in with it. I don't think this is something that's been looked at by the Cabinet.

(b) Response: The proposed administrative regulation is the result of an evolving process that the Cabinet has undertaken since early 1997. The Cabinet has chosen not to require groundwater monitoring as a part of this proposed administrative regulation. Any determination to require such would occur during the actual permitting of the operation.

**(83) Subject: Stringency**

(a) Comment: Pete Cashel, Community Farm Alliance

The regulations should address particular key issues concerning CAFO's: retain "integrator liability" and retain the tiering application that favors smaller producers, who have less of an impact on public health and the environment, unless they expand their operation to the size of a CAFO. The regulatory threshold defining CAFO should not be lowered. The larger operations have contributed most to the demise of small-scale family farms. Public notification should continue for all proposed CAFO's and allow for public participation in the permitting process. Make this legislation effective immediately.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment. This administrative regulation does not address regulatory thresholds or public notification. Those issues are addressed by other regulations.

**(84) Subject: Integrator Liability - Support**

(a) Comment: Pete Cashel, Community Farm Alliance

All persons or corporations who contract with the owner or operator of a CAFO shall be jointly liable for applying for, obtaining, and complying with a KPDES permit. Corporate integrators own the animals and dictate how they will be fed, housed, and managed; therefore, they must be responsible for environmental compliance and liability.

(b) Response: The Cabinet has used its regulatory authority to set forth a "bright line test" to guide the parties as to when an integrator is deemed to have substantial operational control and is therefore considered an operator.

EPA is in agreement with the Cabinet that existing federal regulations create liability on the part of the integrators who meet the test set forth in the proposed administrative regulation. The EPA administrator issues information and guidelines to the states in administering their programs. While guidance documents are not "regulation" or "law", they serve to show how EPA interprets its program and would issue a permit.

**(85) Subject: Individual Permits**

(a) Comment: Pete Cashel, Community Farm Alliance

We agree with the proposed changes that a CAFO shall apply for a KPDES permit, however these permits should be individualized since currently most of the CAFO's are eligible for a General Permits. The KPDES General Permits that are issued/re-issued on a 5-year cycle fail to protect small farmers, public health and our environment because it allows CAFO's to self-monitor and self-inspect, which is a free ticket to pollute.

(b) Response: The proposed administrative regulation does not address the matter of individual or general KPDES permits. Other KPDES regulations, in place for over a decade, have always required public notice and possible hearings for these types of permits.

**(86) Subject: Individual Permits**

(a) Comment: Pete Cashel, Community Farm Alliance

The public should be notified of all proposed CAFO's and have the opportunity to participate in the permitting process. CFA believes that public notice at the time of submission of any application for a permit, a public review and comment period and an opportunity for an informal public hearing, should precede any written decision on permitting a facility.

(b) Response: This administrative regulation does not address regulatory thresholds or public notification. Those issues are addressed by other regulations.

**(87) Subject: Support for Regulations**

(a) Comment: Pete Cashel, Community Farm Alliance

Retain the regulatory threshold defining a CAFO.

(b) Response: This administrative regulation does not address regulatory thresholds or public notification. Those issues are addressed by other regulations.

**(88) Subject: Integrator Liability**

(a) Comment: Pete Cashel, Community Farm Alliance

The use of animal units to determine responsibility is a common, but confusing way of defining who is regulated and who is not. Other states are using either pounds or number of animals as a more useful definition for farmers and the public.

(b) Response: The use of the term "animal units" is consistent with federal NPDES regulations and with historical use of the term in Kentucky. The Cabinet believes that animal units are an effective method of defining the size of an operation. Animal units can relate to either pounds or number of animals using appropriate conversion factors.

**(89) Subject: Support for Regulations**

(a) Comment: Pete Cashel, Community Farm Alliance

As an organization of farmers, we oppose the industrialization of agriculture, favoring farmer friendly policies. We express support for strong regulation of Concentrated Animal Feeding Operations (CAFOs) to prevent these facilities from jeopardizing the survival of family farmers, our public health and our environment.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(90) Subject: Support for Regulations**

(a) Comment: Wade Hampton Helm, KY Conservation Committee

KY Conservation Committee joins with the Cumberland Chapter of the Sierra Club and supports the comments made by W. Henry Graddy, IV made on their behalf.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(91) Subject: Integrator Liability - Support**

(a) Comment: Wade Hampton Helm, KY Conservation Committee  
KY Conservation Committee supports the inclusion of integrator liability in these regulations. The proposed regulation clearly delineates who is an owner and operator and appears consistent with federal law as well.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(92) Subject: Siting Criteria**

(a) Comment: Wade Hampton Helm, KY Conservation Committee  
KY Conservation Committee supports the prohibition on siting CAFO facilities on certain natural features. However, the setback requirements are not sufficient to protect the neighbors from odors, dust and disease vectors common to these CAFO facilities. KY Conservation Committee would strongly support a more protective setback of 5,000 feet to any dwelling school, business, church, cemetery or park and a setback of at least 750 feet to any neighbor's property line.

(b) Response: The proposed administrative regulation is the result of an evolving process that the Cabinet has undertaken since early 1997. The proposed administrative regulation represents the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(93) Subject: Siting Criteria**

(a) Comment: Wade Hampton Helm, KY Conservation Committee  
KY Conservation Committee supports the requirement for permanent litter storage and would urge that the CAFO owner and operator must have a nutrient management plan that is part of the KPDES permit and therefore subject to public comment and review in order to ensure adequate protection of human health and the environment.

(b) Response: Specifically, the Comprehensive Nutrient Management Plan (CNMP), the Agriculture Water Quality Plan, and any applicable NRCS requirements will be evaluated collectively in the development of an appropriate nutrient management plan for a given CAFO operation.

**(94) Subject: Integrator Liability - Support**

(a) Comment: Barbara Thomas, McLean Co. Citizens Against Factory Farms  
I just want everybody to support the integrator liability. It's the best thing. It's one of the smartest things that anybody's ever come up with. I don't understand where you (growers) are coming from when you're fighting integrator liability. We need it.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(95) Subject: Hardship to Farmers**

(a) Comment: Ronnie Larkins, President, Kentucky Poultry Growers Co-op  
I'm very concerned about all these regulations that you are trying to impose on the farming industry. We have complied with the water quality program, your litter storage buildings, feed pads, manure storage barns for our cattle, and we do run soil tests regularly so we won't overload our ground with too much litter. Your regulations will be putting an unbearable hardship on all of the farmers, and these problems will come back to you in the future.

(b) Response: The proposed administrative regulation is the result of an evolving process that the Cabinet has undertaken since early 1997. The proposed administrative regulation represents the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(96) Subject: Need for Regulations - Support**

(a) Comment: Bernardine Edwards, McLean Co Citizens Against Factory Farms  
We need the Governor's regulations on factory farms, lets make the big chicken companies responsible for all the pollution that they are doing to our state.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(97) Subject: Stringency**

(a) Comment: Bernardine Edwards, McLean Co Citizens Against Factory Farms  
The Poultry Federation's BMPs weren't followed. They were suppose to have barriers, instead they bulldozed down all the trees between my place and their chicken houses. The setbacks are not sufficient for the neighbors who live next to them.

(b) Response: The proposed administrative regulation is the result of an evolving process that the Cabinet has undertaken since early 1997. The proposed administrative regulation represents the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(98) Subject: No Emergency**

(a) Comment: Al O'Reilly, Farmer  
I think this whole thing is a waste of time. I fail still to see the emergency. It's a bunch of politics. There's enough laws on the books right now.

(b) Response: The Statement of Emergency was declared by Governor Paul Patton on February 11, 2000. As the Statement of Emergency notes, "Changes in the beef, dairy, poultry, and pork industries have brought a heightened federal interest in concentrated animal feeding operations nationwide. This has created an urgent need to update the federally delegated Kentucky Pollutant Discharge Elimination System (KPDES) permitting program. In addition, the United States Environmental Protection Agency has published a draft administrative

regulation governing concentrated animal feeding operations in the Federal Register, and is under a federal consent decree to finalize that administrative regulation. Therefore, in order to protect human health and the environment, an emergency administrative regulation must be placed into effect immediately”. Governor Patton ordered the Natural Resources and Environmental Protection Cabinet to develop the proposed administrative regulation to protect human health and the environment.

There are waters in Kentucky with moderate to significant water quality impairment attributed to agriculture impacts. The 2000-2001 update to the Kentucky Report to Congress on Water Quality provides the Division of Water’s most recent assessment of water quality conditions and trends. This update reflects changes from the most recent monitoring data developed for the Kentucky, Salt, and Licking River Basins. Agriculture continues to be a significant source of nonsupport of beneficial waterbody use. For those waters assessed, agricultural related pollution was the attributed cause of nonsupport in 1,286 miles of streams and 9,050 acres of lakes in Kentucky. The Cabinet maintains that this administrative regulation is an integral part of addressing the water quality problems remaining in Kentucky’s water bodies.

**(99) Subject: Siting Criteria – Too Restrictive**

(a) Comment: Al O’Reilly, Farmer

One of the things that really irks me is the setback regulations. You can’t put the animal waste within a hundred and fifty feet of the road. But, you can put chemicals right up the asphalt that’ll eat your shoes off if you walk through it. I don’t understand it.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(100) Subject: No Groundwater Damage**

(a) Comment: Al O’Reilly, Farmer

I spent fourteen of my eighteen years (in coal mines) as a fire boss/pump man. I’ve pumped millions, and millions, and millions of gallons of water, worked in places that were running out of old works outside, and I want to tell you, most of that water was nasty. We mined near some towns and settlements, Wheatcroft, (and) some regions out in Webster County, (with) clusters of houses that had straight pipes, and it’s a whole different bailiwick. I pumped stuff out of there that would eat your hands up. I’ve seen cast iron pipes that didn’t last a week because they got eaten up from the acid (mine) water. Low land with animal “doo” ain’t going to hurt nothing.

(b) Response: There are waters in Kentucky with moderate to significant water quality impairment attributed to agriculture impacts. The 2000-2001 update to the Kentucky Report to Congress on Water Quality provides the Division of Water’s most recent assessment of water quality conditions and trends. This update reflects changes from the most recent monitoring data developed for the Kentucky, Salt, and Licking River Basins. Agriculture continues to be a significant source of nonsupport of beneficial waterbody use. For those waters assessed, agricultural related pollution was the attributed cause of nonsupport in 1,286 miles of streams and 9,050 acres of lakes in Kentucky. The Cabinet maintains that this administrative regulation is an integral part of addressing the water quality problems remaining in Kentucky’s water bodies.

**(101) Subject: Unlawful Regulation**

(a) Comment: Dennis Liptrap, Pig Farmer

We've had a total of three legislative sessions. The Cabinet has not brought any legislative action. In fact, they have chosen to oppose legislation that was proposed by others that would have lent clarity to these rules. I would point out to the group here assembled that regulation 5:074 is essentially the same as 5:074E, which was declared void by Judge Crittenden. I guess I have problems when the Executive Branch and the Cabinet chooses to circumvent an elected official and the legislature codify these regulations.

(b) Response: The Cabinet has attempted to work with the General Assembly for satisfactory legislation. The Cabinet has filed post-judgement motions in the Franklin Circuit Court and is awaiting a ruling on the matter.

**(102) Subject: Integrator Liability – Hardship to Farmers**

(a) Comment: Dennis Liptrap, Pig Farmer

One of the things that we bring up is that we need integrator liability and co-permitting to stop the onslaught of corporate agriculture. I would propose to you that this will be self-defeating, or self-fulfilling, however you want to put it. Co-permitting would allow several actions. When given the chance, it probably would have people not enter into the livestock (industry) because we're co-permitting or exposed to liability that is not necessarily under our control. If they choose to enter, they would probably choose to own the facilities. You would, therefore, have even larger production facilities, probably on even more confined land. Either of these (options) would eliminate the choices of our family farms to contract and rear livestock production. I would propose to you that most contract production is done to reduce the exposure of the farm to the market risk. And, anyone who survived the swine industry of 1998, understands market risk. What we have seen in this extended period of time, goes beyond reason into the point of punitive and economic unfeasibility for the livestock industry.

(b) Response: The proposed administrative regulation is the result of an evolving process that the Cabinet has undertaken since early 1997. The proposed administrative regulation represents the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(103) Subject: Unlawful Regulation**

(a) Comment: Neil Allen, KY Farm Bureau's Natural Resources Advisory Committee

State law says the Cabinet cannot make Kentucky CAFO permits require more of farmers than federal CAFO law. We believe this regulation is unlawful because it does require more than the cited federal permit program on CAFOs.

(b) Response: This proposed administrative regulation is not issued only pursuant to the federal Clean Water Act. The proposed administrative regulation is also issued pursuant to the Cabinet's authority under KRS 224.20-110, which gives the Cabinet authority to regulate air pollution, and pursuant to KRS 224.10-100(5), which gives the Cabinet authority to provide for the prevention of odor problems.

**(104) Subject: Unlawful Regulation**

(a) Comment: Neil Allen, KY Farm Bureau's Natural Resources Advisory Committee  
This regulation claims to be a KPDES water permit on livestock property, but the Cabinet's regulation is for setbacks (and) siting requirements for odor. Farm Bureau believes it's not fair, or legal, to include concerns of odor in requirements for the water quality purpose.

(b) Response: This proposed administrative regulation is not issued only pursuant to the federal Clean Water Act. The proposed administrative regulation is also issued pursuant to the Cabinet's authority under KRS 224.20-110, which gives the Cabinet authority to regulate air pollution, and pursuant to KRS 224.10-100(5), which gives the Cabinet authority to provide for the prevention of odor problems.

**(105) Subject: Unlawful Regulation**

(a) Comment: Neil Allen, KY Farm Bureau's Natural Resources Advisory Committee  
Federal law says that these programs should regulate CAFOs because they are a point source for water pollution. Federal law also states that runoff from farm crops and fields is not a point source. This means that the Cabinet has regulated crops and fields with a permit designed just for concentrated livestock operations. The law does not allow the Cabinet to do this.

(b) Response: A CAFO meets the definition of point source. Congress did not define "concentrated animal feeding operations", but EPA has done so in the Code of Federal Regulations. Any operation that meets that definition is a "point source". It thus becomes a facility or activity regulated by the CWA. EPA considers anyone who owns animals at a CAFO or provides operational direction at the CAFO to be the owner or operator of the CAFO.

This proposed administrative regulation also relates to KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110, 224.20-120, 224.70-100, 224.70-110, and 33 U.S.C. § 1342 and the statutory authority for the proposed administrative regulation is KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110 and 33 U.S.C. § 1342.

**(106) Subject: Integrator Liability - Hardship to Farmers**

(a) Comment: Neil Allen, KY Farm Bureau's Natural Resources Advisory Committee  
Our most important concern is the Cabinet's integrator liability requirement. This devastates Kentucky's livestock owners who are in this production. In both the poultry and cattle industries, we've already seen people ending these contracts with Kentucky farmers. Or worse yet, not doing business here at all. These businesses have told us the Cabinet's CAFO regulations are the main reason for loss of business, because no other state requires it like Kentucky. Co-liability puts Kentucky farmers in a serious market disadvantage to producers in other states.

Farm Bureau asks that the Cabinet reconsider its current position on the regulation of CAFO. We hope that you will change future versions of the regulation to be consistent with federal law, so that Kentucky agriculture is on an equal playing field with producers in other states.

(b) Response: The Cabinet is aware of the economic stability and need for Kentucky farmers to stay competitive. Concerns over the beef cattle industry are unfounded. The Cabinet is aware of very few beef producers who may qualify as a CAFO. In some cases, loss of out-of-state contracts may be due to misinformation, rather than legitimate concerns.



The Cabinet disagrees that setbacks and siting requirements are overly restrictive. The Cabinet recognizes the importance of the livestock industry to the economy of the Commonwealth. However, the importance of protecting and conserving Kentucky's environment is equally important to the citizens of the state. EPA expects each delegated state to use their NPDES programs to regulate CAFOs (existing federal regulations mandate NPDES permits for CAFOs). The Cabinet will strive as much as possible to prevent duplication of effort and will attempt to integrate the issuance of KPDES permits into an overall animal waste strategy.

The proposed setbacks are the result of evolving process that the Cabinet has undergone since early 1997. They represent the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time. The Cabinet used all available resources to determine what setback distances would be reasonable to protect both human health and the environment.

**(107) Subject: Statutory Authority**

(a) Comment: Sue Anne Salmon, Concerned Citizen

Since the Farm Bureau has challenged these regulations for not being much different from previously issued regs, why not include a clause to make it illegal from Farm Bureau to sell its financial products in Kentucky?

(b) Response: This is beyond the scope of this proposed administrative regulation.

**(108) Subject: Subject: Corporate Monopolies**

(a) Comment: Sue Anne Salmon, Concerned Citizen

Lack of regulation has allowed Concentrated Animal Feeding Operations to monopolize our grain and livestock markets. Farmers who choose not to become contract growers or chicken or pig baby-sitters for the big meat corporations have no place to turn. Why don't you include a tax on these large meat corporations to help create sustainable, health alternatives to their antibiotic-laden products.

(b) Response: This is beyond the scope of this proposed administrative regulation.

**(109) Subject: Siting Criteria - Inadequate**

(a) Comment: Sue Anne Salmon, Concerned Citizen

We need the strongest regulations possible—setbacks of at least three miles from corporate hog production, outlawing of open-air hog waste lagoons, strict controls on animal waste used in fertilizer. And we need regulations to prohibit feeding of animal waste to other animals.

(b) Response: The proposed administrative regulation is the result of an evolving process that the Cabinet has undertaken since early 1997. The proposed administrative regulation represents the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(110) Subject: Reclassify Chickens as Animals**

(a) Comment: Sue Anne Salmon, Concerned Citizen

Kentucky law currently does not classify chickens as 'animals.' I suggest the regulations correct this erroneous classification, too.

(b) Response: This is beyond the scope of this administrative regulation.

**(111) Subject: Integrator Liability - Support**

(a) Comment: John Porter, Kentuckians for the Commonwealth

A Hudson processing plant (was) built near the Webster and Henderson County line, near Sebree. Some people did know what these chicken processing plants and feeder houses would do from experience in other states. Some Hudson officials knew what would happen when they came into Kentucky because of the lack of regulations. And so, some people that had some space that could build these large chicken houses four hundred, five hundred, eight hundred feet from their neighbors. They built them. Now, since then those people (neighbors) have long term problems. You're not going to find a person who wants to build a house, or buy their (neighbor's) property, because the flies, the odor, and the mice are hell there.

(One owner) He built some houses sometime ago, some two thousand feet from a friend of mine. And (even) at two thousand feet from well-managed chicken houses, if the atmospheric conditions are right, they (neighbors) can't use their yards. Those people have to get out of their yards because of some chicken houses two thousand feet away.

Integrator liability is the only way we can hold these companies responsible for what they do. We must have integrator liability and we must have the Tysons, and such parties, as that to call.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(112) Subject: Need for Regulations - Support**

(a) Comment: Karol Welch, Magistrate, Hopkins County Fiscal Court

I want to stress to you that there must be regulations for concentrated animal feeding operations to protect every person in Kentucky. We appreciate what regulations you have presented, although they need to be stronger. Stronger regulations will help stop the threat to public health and Kentucky can send a much-needed mandate for federal "much in want" regulations.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(113) Subject: Siting Criteria – Too Lenient**

(a) Comment: Karol Welch, Magistrate, Hopkins County Fiscal Court

Siting criteria needs to be increased. We need to protect our water, and our air is sometimes so bad that people cannot stand it, making their home lives unbearable.

(b) Response: The proposed administrative regulation is the result of an evolving process that the Cabinet has undertaken since early 1997. The proposed administrative regulation represents the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(114) Subject: Integrator Liability - Support**

(a) Comment: Karol Welch, Magistrate, Hopkins County Fiscal Court

The next most important need is for integrator liability. Surprisingly, I have had several poultry farmers talk to me. They are afraid to say they want integrator liability because their chickens will be removed.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(115) Subject: Need for Regulations - Support**

(a) Comment: Scott Vander Ploeg, Chair, Tradewater/Bowling Green Watershed Watch Project

One of the things that have been much a football here is the administrativeness of these regulations and the question of their emergency nature. I think when lives are in peril there is emergency, though I think the term “emergency” here is just simply a misnomer for something that has to be done in place of perhaps anything else, and that’s the big problem. That’s what I think Judge Crittenden cited, as a problem with the governor’s regulations, is that they did not meet legislative intent. What is that? Where is there legislative intent when the legislature will not act? There is no intent there whatsoever, and, therefore, I think it is fully within the rights and, in fact, the responsibility of the administration to come up with regulations to protect us in the lack of other actions by our elected officials. I would just sort of -- a little side mental comment, apparently it’s cheaper to buy off one of those than it is to buy off the governor.

(b) Response: Governor Paul Patton declared the Statement of Emergency on February 11, 2000. As the Statement of Emergency notes, “Changes in the beef, dairy, poultry, and pork industries have brought a heightened federal interest in concentrated animal feeding operations nationwide. This has created an urgent need to update the federally delegated Kentucky Pollutant Discharge Elimination System (KPDES) permitting program. In addition, the United States Environmental Protection Agency has published a draft administrative regulation governing concentrated animal feeding operations in the Federal Register, and is under a federal consent decree to finalize that administrative regulation. Therefore, in order to protect human health and the environment, an emergency administrative regulation must be placed into effect immediately”. Governor Patton ordered the Natural Resources and Environmental Protection Cabinet to develop the proposed administrative regulation to protect human health and the environment.

There are waters in Kentucky with moderate to significant water quality impairment attributed to agriculture impacts. The 2000-2001 update to the Kentucky Report to Congress on Water Quality provides the Division of Water’s most recent assessment of water quality conditions and trends. This update reflects changes from the most recent monitoring data developed for the Kentucky, Salt, and Licking River Basins. Agriculture continues to be a significant source of nonsupport of beneficial waterbody use. For those waters assessed, agricultural related pollution was the attributed cause of nonsupport in 1,286 miles of streams and 9,050 acres of lakes in Kentucky. The Cabinet maintains that this administrative regulation is an integral part of addressing the water quality problems remaining in Kentucky’s water bodies.

**(116) Subject: Need for Regulations - Support**

(a) Comment: Scott Vander Ploeg, Chair, Tradewater/Bowling Green Watershed Watch Project

I think that what has not been brought up in any of the discussions so far is the attractiveness of the industry to Kentucky and to the people who might come to visit in Kentucky. There's a great interest in tourism and generating lots of money from the tourism.

I think it's a great injustice to any kind of tourism concept, when we want to generate monies off people wanting to come here, to actually ask them to come here and smell this stuff.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(117) Subject: Need for Regulations - Support**

(a) Comment: Norma Cain, Concerned Citizen

We need the regulations. Being in my home, where the flies covered my screens, and they made a curtain over them; you couldn't see out of them. I've taken my water samples. The odor is literally breathtaking, and I do mean it will make you sick. You will throw up. My kids come in from the outside. They smell like chicken manure, they smell like ammonia.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

**(118) Subject: Siting Criteria – Too Lenient**

(a) Comment: Norma Cain, Concerned Citizen

The setbacks are not far enough. Being where I've lived, the closest (chicken houses) were 300 feet, the furthest was 1,000 feet. That's not far enough. Manure was running down and onto my property from the wash houses, from the rain, from any place out there because I lived a floodplain as well. There is no "Good Neighbor" policy because they were not considering the people that were already there.

Tyson officials promised me "You're not going to smell nothing. Your water is going to be fine. You'll never get sick." I asked for a guarantee in writing, they couldn't give it to me. Everything they told me that would not happen did.

(b) Response: The proposed administrative regulation is the result of an evolving process that the Cabinet has undertaken since early 1997. The proposed administrative regulation represents the Cabinet's Best Professional Judgement of what is needed to protect human health and the environment at this time.

**(119) Subject: Integrator Liability - Support**

(a) Comment: Norma Cain, Concerned Citizen

Integrator liability is the only thing that is going to help the (chicken) farmers should something happen. And it will. It's happened in every other state. Kentucky is no different.

Eventually, Tyson will be moving out, to somewhere else. And then, what will happen to Kentucky? The same thing that has happened everywhere else, environmental disaster. Protect us. Protect the environment.

(b) Response: The Cabinet notes the comment. This proposed administrative regulation is designed to protect human health and the environment.

#### IV. Summary of Statement of Consideration and Action Taken by Promulgating Body

##### General Summary:

On March 23, 2001, the Kentucky Natural Resources and Environmental Protection Cabinet, Division of Water submitted a Notice of Intent to Promulgate an Administrative Regulation to the Regulations Compiler for publication in the May Administrative Register of Kentucky. A Public hearing to receive comments on the Notice of Intent for this administrative regulation was conducted May 22, 2001, at 6:30 p.m. Central Time at the Madisonville Technical College, Byrnes Auditorium, 750 North Lafoon Drive, in Madisonville, Kentucky.

Prior to, and during, the public hearing the Natural Resources and Environmental Protection Cabinet (NREPC), Division of Water, received written and oral comments from individuals and organizations regarding the notice of intent to promulgate a new administrative regulation. These comments were summarized and reviewed by the Division of Water. The comments and the Division of Water's responses were compiled into a Notice of Intent Statement of Consideration. This document was filed along with the Division of Water's proposed new administrative regulation 401 KAR 5:074 – KPDES permit conditions for beef, dairy, poultry and swine concentrated animal feeding operations.

The regulation was published in the July 2001 edition of the Administrative Register of Kentucky, along with the announcement of the public hearing for the proposed administrative regulation. In addition, the Public Hearing Notice was distributed to over 900 individuals and was posted on the web sites for the Division of Water and the KPDES Branch. Copies of the proposed regulation and the Notice of Intent Statement of Consideration were sent to all requesting attendants of the public hearing for the Notice of Intent to Promulgate.

The hearing for the proposed administrative regulation was held on July 23, 2001 at 6:30 p.m. Central Time at the Madisonville Technical College, Byrnes Auditorium, 750 North Lafoon Drive, in Madisonville, Kentucky. In addition to the representatives of the issuing administrative body, forty-three (43) people attended the public hearing or submitted written comments. There were fifteen attendees who chose to be heard.

##### Actions Taken:

The Cabinet reviewed all comments received before the adjournment of the public hearing, and completed this Statement of Consideration. In addition to the Statement of Consideration, the proposed new administrative regulation 401 KAR 5:074 – KPDES permit conditions for beef, dairy, poultry and swine concentrated animal feeding operations, was not amended after hearing. The Cabinet requests that the Administrative Regulation Review Subcommittee (ARRS) accept these documents for review at their September 2001 meeting.